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Supreme Court of the United States

October Term, 1969

No. ~~79~~ 18

In the Matter of the Application of
MARTIN ROBERT STOLAR
for Admission to the March, 1969,
Ohio Bar Examination

PETITIONER'S REPLY BRIEF

Leonard B. Boudin
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017

William Boyland
78 East State Street
Columbus, Ohio

Attorneys for the Petitioner

David Rosenberg,
of Counsel.

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1. Preliminarily, it should be noted that while this case is similar to *Baird* v. *State Bar of Arizona*, *cert. granted* 394 U.S. 957, No. 53, the invasion of the applicant's First Amendment rights in Ohio is of broader dimensions. Petitioner, like the applicant in *Baird*, challenges the power of state bar authorities to compel disclosure of his association with "any organization which advocates" forceful overthrow of government. But additionally, petitioner contests the constitutionality of two other searching and indiscriminate, and in their breadth, far more unlimited interrogatories which require disclosure of *all* past and present associations.

2. Respondents attempt to justify their practice, principally, by arguing that Ohio's interest in regulating admission to its Bar answers all First Amendment questions regarding its sweeping associational inquiry.

This argument is contrary to a long line of decisions in this Court prohibiting the effectuation even of legitimate governmental purposes, including regulation of the Bar, "by means that broadly stifle fundamental personal liberties." *Shelton* v.

Tucker, 364 U.S. 479, 488. "For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP* v. *Button*, 371 U.S. 415, 439; *Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217, 222. See also *United States* v. *O'Brien*, 391 U.S. 367, 381; *United States* v. *Robel*, 389 U.S. 258, 265-268; *Schneider* v. *New Jersey*, 308 U.S. 147, 161.

Thus, "an unlimited and indiscriminate search" of an individual's associational past, such as respondents claim they are entitled to conduct in this case, has been ruled unconstitutionally overbroad by this Court in cases closely analogous to the present one. See *Shelton* v. *Tucker, supra; Schneider* v. *Smith*, 390 U.S. 17, 24 and at 27 (Mr. Justice Fortas concurring).

Moreover, Ohio's interest in regulating its Bar does not solve the First Amendment problems raised by the other aspects of imprecision in its admission process.

For example, respondents admit that an affirmative answer to question 12(g)[1] or an unorthodox association disclosed in answer to questions 7 and 13[2] is employed as the triggering device for prolonged investigation, unlimited political interrogation

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1. Question 12(g) reads in pertinent part:

"State whether you have been or presently are: A member of any organization which advocates the overthrow of the government of the United States by force.

"If the answer to any section of the above question is 'yes', set forth the facts in detail . . ."

2. Question 7 provides: "List the names and addresses of all clubs, societies or organizations of which you are or have been a member since registering as a law student."

Question 13 provides: "List the names and addresses of all clubs, societies or organizations of which you are or have been a member."

and extensive delay in final determination of the applicant's qualifications. (Res. Br. p. 13.) As petitioner has pointed out (Pet. p. 12), this practice of respondents penalizes an applicant's exercise of his First Amendment right of association. Guilty association is presumed from the mere disclosure of membership. As a result, the applicant is forced into a position of having to rebut this wholly arbitrary presumption; in effect he must prove the lawfulness of his association, and in essence his beliefs. This he must do by submitting to respondents' probing interrogation instituted in Question 12(g) and carried forward in personal interviews. As a result, the applicant is compelled to disclose, explain and justify to respondents' satisfaction, every aspect of his association and beliefs. This practice is directly contrary to the rulings in *Speiser* v. *Randall*, 357 U.S. 513; *Dombrowski* v. *Pfister*, 380 U.S. 479, 494-496; *Robel* v. *United States*, 389 U.S. 258, 266 and n. 16; *Elfbrandt* v. *Russell*, 384 U.S. 11, 19; *United States* v. *Brown*, 381 U.S. 437; *Schneiderman* v. *United States*, *supra* at 136; see also *Haskett* v. *Washington*, 294 F. Supp. 912, 915, 916-917 (Wright, J., concurring).[3]

This practice is also unconstitutionally overbroad because the presumption of unlawful membership is, as in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 608-609, irrebuttable. The goal of respondents' "investigation" is "to determine whether petitioner did, at the time of such membership, also espouse such illegal aims [of the organization] or whether he now espouses such illegal aims" (Res. Br. p. 13). It is clear that respondents' test for unlawful association is met by mere advocacy. Proof that the applicant's "espous[al]" was neither

3. In addition to creating an arbitrary presumption of guilty association and casting the burden of proving lawful association on the applicant, Question 12(g) suffers in other respects from unconstitutional overbreadth and vagueness, which are fully delineated in the Petition at pp. 10-14.

directed toward "inciting or producing imminent lawless action" (*Brandenberg* v. *Ohio*, 395 U.S. 444, 447-448) nor specifically intended to further the organization's unlawful aims by resort to criminal conduct. *Scales* v. *United States*, 367 U.S. 203, 229; *Yates* v. *United States*, 354 U.S. 298; 330 n. 36, 331 is irrelevant under respondents' scheme of things.

3. Respondents state repeatedly that petitioner's refusal to answer their broad-ranging questions *obstructed* their investigation of his character (Res. Br. p. 11, 12-14). But neither the committee nor the court below made findings of fact, as they are constitutionally required, to support their bald conclusion of obstruction. See *Wood* v. *Georgia*, 370 U.S. 375, 386-387; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239.

Nor did respondents make any effort before this Court to explain with some degree of particularity how petitioner obstructed the investigation. Indeed, respondents' case of obstruction is nothing more than conjecture: "the requested information *may* provide a valuable insight [Res. Br. p. 12] . . . the answers *might* show little need to proceed further [*ibid*] . . . knowledge of such organizations and associations *might* well direct the committee's attention to persons familiar to them who have known the applicant [*id.* at 13]" (emphasis supplied). The purely roving nature of this inquiry is made even more pernicious by respondents' position that "*if* the list of associations and clubs raises no question concerning petitioner's meeting the minimum standards, this also assists the committee in making its determination" (Res. Br. p. 13). This attempt to determine an applicant's political beliefs by a process of exclusion is thoroughly unreasonable. The committee is left to act, without standards or procedural restrictions, to reward applicants whose political orthodoxy conforms to the

committee's and to penalize nonconforming applicants with extended political investigation.

Finally, this case is wholly unlike *Konigsberg* v. *State Bar*, 366 U.S. 36. There are no "gaps" to fill here, and the record concerning the applicant's political fitness is not in a state of "uncertainty." *Id.* at 45, 46. To the contrary, on the basis of this record, respondents' insistence that petitioner answer the three questions is merely *pro forma*. The information sought by these questions was already in respondents' hands *via* the New York questionnaire which contained similar questions and which petitioner had answered. Furthermore, petitioner's refusal could hardly be termed obstruction, since he unhesitatingly answered the committee's questions concerning particular associations. Compare *Konigsberg* v. *State Bar*, *supra* at 39 [applicant refused "to answer *any* questions relating to membership in the Communist Party" (emphasis supplied)].

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Leonard B. Boudin
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017

William Boyland
78 East State Street
Columbus, Ohio

Attorneys for the Petitioner

David Rosenberg,
of Counsel.

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